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Wescourt Design Sdn Bhd v Wescourt Furnishing (M) Sdn Bhd

B

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-1096–09 OF 2012
LIM CHONG FONG JC
31 JULY 2015

C

Civil Procedure — Action — Claim for goods sold and delivered — Allegation of conspiracy to defraud and breach of fiduciary director's duty — Action seeking for loss of monies for goods supplied — Claim for recovery of expenses forked out — Whether burden of proof discharged on balance of probabilities — Whether claim ought to be allowed

D

Wescourt Design Sdn Bhd ('WDSB') was a company involved in the design, manufacture and supply of household furniture and controlled by one Wan Yin Ney. Wescourt Furnishing (M) Sdn Bhd ('WFMSB') was also a company
E which ventured particularly into the business of retailing in household furniture. The shareholders of the WFMSB were Loh Yew Kong (30%), Ho Kam Chon (30%), Wan Yin Ney (20%) and Wan Kim Hong (20%). All four of them are also directors of WFMSB at the material time. WDSB sued WFMSB for unpaid household furniture supplied and transferred over to
F WFMSB as well as for various disbursements such as mobile phone charges, electricity bill, etc incurred by WDSB on behalf of WFMSB. By counterclaim pursuant to O 15 rr 2 and 3 of the Rules of Court 2012, WFMSB sued WDSB, Wan Yin Ney and Wang Kim Hong for conspiracy to defraud and breach of fiduciary director's duty by surreptitiously running WFMSB's retail business to
G their benefit including failing to properly account to WFMSB's majority shareholders. They further knowingly utilised WDSB to assist their aforesaid torts. Loh Yew Kong and Ho Kam Chon were interested to invest and venture into the household furniture business but both of them neither have expertise nor experience therein. They met Wan Yin Ney to set up a joint business
H venture company to retail household furniture and fittings and WFMSB was born.The founding shareholders and directors were Loh Yew Kong, Ho Kam Chon, Wan Yin Ney and Wan Kim Hong. The joint business venture arrangement was that Loh Yew Kong and Ho Kam Chon would inject as capital the sum of RM1.2m into WFMSB. Wan Yin Wei and Wan Kim Hong
I weren't required to make any capital injection but they were to contribute their knowledge and expertise to manage and administer WFMSB's business absolutely subject to the right of the shareholders of WFMSB to ask for account. WFMSB opened numerous retail outlets particularly at AEON Jusco hypermarkets. In the course of managing WFMSB's business, WDSB had

supplied the furniture to WFMSB by way of furniture stock transfer from WDSB as well as Westcourt Furniture World Sdn Bhd. The latter was another company also controlled by Wan Yin Ney. Since WFMSB did not initially have a credit card collection banking facility, WDSB also for some time provided and utilised WDSB's credit card collection banking facility to receive payments directly from retail customers of WFMSB. Loh Yew Kong and Ho Kam Chon had remained as inactive shareholders and directors. They entrusted Wan Yin Ney and Wan Kim Hong to diligently and faithfully manage and administer WFMSB. They signed cheques as co-signatory at the request of Wan Yin Ney or Wan Kim Hong or their employees. However Wan Yin Ney and Wan Kim Hong failed, refused and/or neglected to satisfactorily provide the financial statement or statement of account of WFMSB to Loh Yew Kong and Ho Kam Chon despite numerous requests by them. As the result, there were several management meetings held in the second half of 2011 in attempt to sort out the differences between the shareholders of WFMSB that have arisen particularly on the non-provision of the statement of account of WFMSB by Wan Yin Ney and Wan Kim Hong. Finally both Wan Yin Ney and Wan Kim Hong resigned as directors of WFMSB. Loh Yew Kong and Ho Kam Chon took over the management and administration of WFMSB and investigated into the financial affairs of WFMSB. In the meantime, WDSB commenced this action seeking for the sum of RM376,393.87 for the goods supplied and RM32,378.08 for the recovery of the expenses totalling to RM408,771.95 together with interest and costs.

Held:

(1) WDSB must in the pursuit of its claim in the circumstances establish that the property in the furniture had passed from WDSB to WFMSB. In other words, it must be established that the transfer of the furniture was an outright sale and not on consignment for display only. If it was on consignment, the furniture would of course be deemed sold to WFMSB if the furniture has been subsequently purchased by WFMSB's customers (see para 30).

(2) There were numerous purchase orders issued by WFMSB for furniture and accessories to be delivered but there was no price indicated in the purchase order and it was unclear who in WFMSB made the order. There were numerous store delivery orders of furniture and accessories delivered to other stores and several of the delivery orders have WFMSB's endorsement of receipt but many others were blank. The 33 invoices were actually inter-company memos referring to a list of invoices but these invoices were not produced. The WDSB had not discharged its burden of proof on the balance of probabilities and the claim for the allegedly unpaid furniture and accessories supplied in the sum of RM376,393.87 must fail for want of proof (see paras 33 & 36).

(3) Wan Yin Ney and Wan Kim Hong had not satisfactorily discharged their fiduciary duties as directors of WFMSB. They had not adequately accounted for the sales and financial transactions that occurred and ensured that proper records were properly prepared, kept and retrievable during their watch. There was reasonable suspicion that they might have benefitted personally through WFMSB. In the circumstances, the court hence find and hold that they have breached both their common law and statutory duties as directors of the company. In the same vein, WDSB that is controlled by Wan Yin Ney has also not properly accounted for the sales and financial transactions involved on behalf of WFMSB. In law, the sale proceeds of WFMSB handled by WDSB were subject to a resulting trust (see para 56).

(4) The original claim was dismissed. The counterclaim was allowed in that WDSB, Wan Yin Ney and Wan Kim Hong were ordered to account to WFMSB for all the transactions in respect of or in connection with WFMSB and payment of damages to WFMSB as ascertained upon the taking of the accounts together with interests thereon at 5%pa from 7 November 2012 until full realisation (see para 59).

[Bahasa Malaysia summary

Wescourt Design Sdn Bhd ('WDSB') adalah syarikat yang terlibat dalam reka bentuk, pembuatan dan membekalkan perabot rumah dan dikawal selia oleh seorang Wan Yin Ney. Wescourt Furnishing (M) Sdn Bhd ('WFMSB') juga adalah sebuah syarikat yang memulakan perusahaan khususnya ke dalam perniagaan peruncitan dalam perabot rumah. Para pemegang saham WFMSB mereka ialah Loh Yew Kong (30%), Ho Kam Chon (30%), Wan Yin Ney (20%) dan Wan Kim Hong (20%). Keempat-empat mereka juga pengarah WFMSB pada masa yang material. WDSB menyaman WFMSB untuk perabot rumah yang tidak dibayar dibekalkan dan dipindahkan ke WFMSB dan juga untuk pelbagai pembayaran seperti caj telefon bimbit, bil elektrik, dan lain-lain yang dilakukan oleh WDSB bagi pihak WFMSB. Oleh tuntutan balas menurut A 15 k 2 dan 3 Kaedah-Kaedah Mahkamah 2012, WFMSB menyaman WDSB, Wan Yin Ney dan Wang Kim Hong secara konspirasi untuk menipu dan pelanggaran tanggungjawab pengarah fidusiari dengan secara rahsia menjalankan perniagaan runcit WFMSB untuk faedah mereka termasuk gagal untuk menjelaskan dengan sewajarnya kepada para pemegang saham majoriti WFMSB ini. Mereka juga dengan sengaja menggunakan WDSB untuk membantu tort tersebut di atas mereka. Loh Yew Kong and Ho Kam Chon berminat untuk melabur dan mengusahakan perniagaan perabot rumah tetapi kedua-dua mereka tidak mempunyai kepakaran dan pengalaman dalam bidang itu. Mereka berjumpa dengan Wan Yin Ney untuk memulakan syarikat perusahaan usaha sama untuk peruncitan perabot rumah dan perlengkapan dan WFMSB ditubuhkan. Para pemegang saham dan pengarah adalah Loh Yew Kong, Ho Kam Chon, Wan Yin Ney dan Wan Kim Hong.

Aturan perniagaan usaha sama adalah bahawa Loh Yew Kong, Ho Kam Chon akan menyuntikkan modal berjumlah RM1.2 juta ke dalam WFMSB. Wan Yin Wei dan Wan Kim Hong tidak perlu untuk membuat apa-apa suntikan modal tetapi mereka perlu menyumbang pengetahuan dan kepakaran mereka untuk menguruskan dan mentadbir perniagaan WFMSB sama sekali tertakluk kepada hak para pemegang saham WFMSB untuk meminta akaun. WFMSB membuka beberapa cawangan runcit khususnya di AEON Jusco hypermarkets. Dalam menjalankan urusan perniagaan WFMSB, WDSB membekalkan perabot kepada WFMSB melalui pemindahan stok perabot daripada WDSB dan juga Westcourt Furniture World Sdn Bhd yang kedua adalah syarikat lain yang juga dikawal oleh Wan Yin Ney. Memandangkan WFMSB awalnya tidak memiliki kemudahan perbankan perkumpulan kad kredit, WDSB juga untuk beberapa waktu memperuntukkan dan menggunakan kemudahan perbankan perkumpulan kad kredit WDSB untuk menerima bayaran langsung daripada pelanggan runcit WFMSB. Loh Yew Kong dan Ho Kam Chon kekal sebagai pemegang saham dan pengarah tidak aktif. Mereka mengamanahkan Wan Yin Ney dan Wan Kim Hong untuk dengan teliti dan jujur menguruskan dan mentadbir WFMSB. Mereka menandatangani cek sebagai penandatangan bersama atas permintaan Wan Yin Ney atau Wan Kim Hong atau pekerja mereka. Walau bagaimanapun Wan Yin Ney dan Wan Kim Hong gagal, enggan dan/atau mengabaikan untuk memperuntukkan secara memuaskan penyata kewangan atau penyata akaun WFMSB kepada Loh Yew Kong dan Ho Kam Chon meskipun beberapa kali diminta oleh mereka. Akibatnya, terdapat beberapa mesyuarat pengurusan diadakan pada setengah tahun kedua 2011 dalam percubaan untuk menyelesaikan percanggahan antara pemegang saham WFMSB yang telah timbul terutama ketiadaan peruntukan penyata akaun WFMSB oleh Wan Yin Ney dan Wan Kim Hong. Akhirnya kedua-dua Wan Yin Ney dan Wan Kim Hong meletakkan jawatan sebagai Pengarah WFMSB. Loh Yew Kong dan Ho Kam Chon mengambil alih pengurusan dan pentadbiran WFMSB dan menyelidiki hal ehwal kewangan WFMSB. Dalam masa yang sama, WDSB memulakan tindakan ini memohon untuk jumlah sebanyak RM376,393.87 untuk barang yang dibekalkan dan RM32,378.08 untuk pengembalian perbelanjaan berjumlah RM408,771.95 bersama dengan faedah dan kos.

Diputuskan:

(1) WDSB perlu dalam menuntut tuntutan dalam keadaan membuktikan bahawa harta di perabot telah berpindah daripada WDSB untuk WFMSB. Dalam erti kata lain, ia perlu membuktikan bahawa pemindahan perabot adalah suatu penjualan secara terang-terangan dan tidak pada konsainan untuk paparan sahaja. Jika ia adalah pada konsainan, perabot sudah tentu akan dianggap dijual kepada WFMSB jika perabot telah kemudiannya dibeli oleh pelanggan WFMSB (lihat perenggan 30).

(2) Terdapat pesanan pembelian yang banyak dikeluarkan oleh WFMSB untuk perabot dan aksesori untuk dihantar tetapi tidak ada harga yang dinyatakan dalam pesanan belian dan ia adalah tidak jelas siapa di WFMSB yang membuat keputusan itu. Terdapat beberapa pesanan penghantaran kedai perabot dan aksesori dihantar ke kedai-kedai lain dan beberapa pesanan penghantaran dengan perakuan penerimaan WFMSB akan tetapi kebanyakkannya kosong. 33 invois sebenarnya memo antara syarikat merujuk kepada senarai invois tetapi ini telah tidak dikemukakan. WDSB telah tidak melepaskan beban bukti atas imbangan kebarangkalian dan tuntutan untuk perabot yang didakwa tidak dibayar dan aksesori yang dibekalkan berjumlah RM376,393.87 mesti gagal kerana ketiadaan bukti (lihat perenggan 33 & 36).

(3) Wan Yin Ney dan Wan Kim Hong tidak secara memuaskan melepaskan tanggungjawab fidusiari mereka sebagai Pengarah WFMSB. Mereka tidak dengan cukup menjelaskan penjualan dan transaksi kewangan yang berlaku dan memastikan bahawa rekod yang sewajarnya disediakan dengan betul, disimpan dan boleh didapati semula selama pengawasan mereka. Terdapat syak yang munasabah bahawa mereka mungkin telah mendapat faedah secara peribadi melalui WFMSB. Dalam keadaan ini, mahkamah dengan itu mendapati dan memutuskan bahawa mereka telah melanggar kedua-dua *common law* dan kewajipan berkanun sebagai pengarah syarikat. Dalam kes yang sama, WDSB yang dikawal oleh Wan Yin Ney juga tidak betul menyatakan jualan dan transaksi kewangan yang terlibat bagi pihak WFMSB (lihat perenggan 56).

(4) Tuntutan asal telah ditolak. Tuntutan balas dibenarkan dengan itu, Wan Yin Ney dan Wan Kim Hong diperintahkan untuk mengemukakan kepada WFMSB kesemua transaksi berkenaan atau berkaitan dengan WFMSB dan bayaran ganti rugi kepada WFMSB seperti yang ditentukan di atas suatu perkara yang bersama-sama dengan faedah ke atasnya pada kadar 5% setahun dari 7 November 2012 sehingga penyelesaian sepenuhnya (lihat perenggan 59).]

Notes

For cases on claim for goods sold and delivered, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 93–94.

Cases referred to

Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Networks Systems (M) Sdn Bhd) v Solid Investment Ltd [2012] 4 MLJ 72, CA (refd)

CFB Aluminium Extrusion Sdn Bhd v Lim Soon Seng [2014] AMEJ 1192, HC (refd)

Magnifine Sdn Bhd v Yap Mun Him [2005] 6 CLJ 413, HC (refd)

Mohd Zain Yusoff & Ors v Avel Consultant Sdn Bhd & Anor [2006] 6 MLJ 314; [2006] 5 AMR 489, CA (refd)

Planete Enfants Sdn Bhd v Goh San Hwa & another case [2015] AMEJ 38, HC (refd)
Simmah Timber Industries Sdn Bhd v David Low See Kiat & Ors [1999] 5 MLJ 421, HC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors And Other Appeals [1996] 2 MLJ 265, CA (refd)
Warman International Ltd v Dwyer (1995) 182 CLR 544 (refd)

Legislation referred to

Companies Act 1965
Evidence Act 1950 s 114(g)
Rules of Court 2012 O 15 rr 2, 3, O 43, 44

Zulfahami bin Abu Bakar (Hasshahari & Partners) for the plaintiff.
Ramesh Sivakumar a/l R Ramaveloo (Ramesh & Loo) for the defendant.

Lim Chong Fong JC:

INTRODUCTION

[1] This case concerns a dispute primarily between related companies involved in the business of trading in household furniture and fittings.

[2] Wescourt Design Sdn Bhd ('WDSB') is a private limited company involved in the design, manufacture and supply of household furniture since its incorporation in 2007 and controlled by a Wan Yin Ney who has extensive experience in the household furniture business.

[3] Wescourt Furnishing (M) Sdn Bhd ('WFMSB') is also a private limited company incorporated in 2010 to venture particularly into the business of retailingin household furniture. The shareholders of the WFMSB are Loh Yew Kong (30%), Ho Kam Chon (30%), Wan Yin Ney (20%) and Wan Kim Hong (20%). All four of them are also Directors of WFMSB at the material time. Wan Yin Ney and Wan Kim Hong are siblings.

[4] In this case, WDSB in the original claim sued WFMSB for unpaid household furniture supplied and transferred over to WFMSB as well as for various disbursements such as mobile phone charges, electricity bill, etc incurred by WDSB on behalf of WFMSB.

By counterclaim added pursuant to O 15 rr 2 and 3 of the Rules of Court 2012, WFMSB sued WDSB, Wan Yin Ney and Wang Kim Hong for conspiracy to defraud and breach of fiduciary director's duty by surreptitiously running WFMSB's retail business to their benefit including failing to properly account

to WFMSB's majority shareholders. They further knowingly utilised WDSB to assist their aforesaid torts.

THE TRIAL PROCESS

[5] The trial of the original claim and counterclaim were heard jointly over four days on 14 August, 17 October, 22 and 24 December 2014.

[6] For purposes of the trial, the documents were marked as bundles A to I including the documentary evidence in bundles B to D which were consented by the parties at the commencement of the trial to be of unconditional status B. During the course of the trial, exhs P1 to D17 were also admitted in evidence.

[7] The following witnesses testified at the trial:

(a) Choo Oi Fong ('PW1'), a director of WDSB and wife of Wan Kim Hong;

(b) Wan Kim Hong ('PW2'), the logistics manager of WDSB and former director of WFMSB;

(c) Ho Kam Chon ('DW1'), a director of WFMSB;

(d) Chang Siew Foong ('DW2'), a certified public accountant and director of S F Chang Corporate Services Sdn Bhd; and

(e) Loh Yew Kong ('DW3'), a director of WFMSB.

[8] After the close of trial, the parties simultaneously filed their written closing submission in chief and in reply. By reason of the late completion of the typed notes of proceedings documenting the oral evidence adduced; hence delayed submission of the written submissions. Oral clarifications with counsel were then held on 6 May 2015 and 10 June 2015.

BACKGROUND FACTS

[9] Loh Yew Kong and Ho Kam Chon were interested to invest and venture into the household furniture business but both of them neither have expertise nor experience therein.

[10] On or around March 2010, they met Wan Yin Ney who has in excess of 20 years experience in the furniture business to explore the setting up of a joint business venture company to retail household furniture and fittings. After negotiations, they agreed to the setting up of WFMSB on 10 March 2010. The founding shareholders and directors were Loh Yew Kong, Ho Kam Chon, Wan Yin Ney and Wan Kim Hong.

[11] The joint business venture arrangement was that Loh Yew Kong and Ho Kam Chon would inject as capital the sum of RM1.2m into WFMSB. Wan Yin Wei and Wan Kim Hong weren't required to make any capital injection but they were to contribute their knowledge and expertise to manage and administer WFMSB's business absolutely subject to the right of the shareholders of WFMSB to ask for account.

[12] WFMSB opened numerous retail outlets particularly at AEON Jusco hypermarkets. In the course of managing WFMSB's business, WDSB has since April 2010 supplied the furniture to WFMSB by way of furniture stock transfer from WDSB as well as Westcourt Furniture World Sdn Bhd. The latter is another company also controlled by Wan Yin Ney.

[13] Furthermore WDSB deployed its staff to administer WFMSB retail outlets particularly Choo Oi Fong who managed the finance and accounts of WFMSB. She was also a cheque signatory and had access to the internet banking facility of WFMSB. Since WFMSB did not initially have a credit card collection banking facility, WDSB also for some time provided and utilised WDSB's credit card collection banking facility to receive payments directly from retail customers of WFMSB.

[14] Loh Yew Kong and Ho Kam Chon have since April 2010 to November 2011 remained as inactive shareholders and directors. They entrusted Wan Yin Ney and Wan Kim Hong to diligently and faithfully manage and administer WFMSB. They have signed cheques as co-signatory at the request of Wan Yin Ney or Wan Kim Hong or their employees.

[15] However Wan Yin Ney and Wan Kim Hong failed, refused and/or neglected to satisfactorily provide the financial statement or statement of account of WFMSB to Loh Yew Kong and Ho Kam Chon despite numerous requests by them.

[16] As the result, there were several management meetings held in the second half of 2011 in attempt to sort out the differences between the shareholders of WFMSB that have arisen particularly on the non provision of the statement of account of WFMSB by Wan Yin Ney and Wan Kim Hong.

[17] Finally both Wan Yin Ney and Wan Kim Hong resigned as directors of WFMSB on 25 November 2011.

[18] Loh Yew Kong and Ho Kam Chon thereafter took over the management and administration of WFMSB and appointed S F Chang

Corporate Services Sdn Bhd to investigate into the financial affairs of WFMSB. A report dated 5 August 2014 was eventually submitted by S F Chang Corporate Services Sdn Bhd.

[19] In the meantime, WDSB commenced this action on 7 September 2012.

CONTENTIONS OF THE PARTIES

[20] The parties' respective positions and contentions can be distilled from the pleadings as summarised hereinafter.

ORIGINAL CLAIM OF WDSB

[21] As far as WDSB is concerned, this is straight forward goods sold and delivered claim as well as claim for recovery of expenses incurred and advanced on behalf of WFMSB.

[22] Accordingly WDSB sought for the sum of RM376,393.87 for the goods supplied and RM32,378.08 for the recovery of the expenses as particularised in para 8 of the statement of claim totalling to RM408,771.95 together with interest and costs.

DEFENCE AND COUNTERCLAIM OF WFMSB

[23] As for WDSB's claim, WFMSB denied the same and primarily put WDSB to strict proof thereof. In addition, WFMSB contended that the sale transactions as claimed were falsified.

[24] In respect of WFMSB's counterclaim, it is in gist contended that both Wan Yin Ney and Wan Kim Hong who were entrusted with fiduciary duties to manage and administer WFMSB committed deceit, misappropriation and breach of trust as particularised in para 25 of the statement of defence and counterclaim. Accordingly it is pleaded in they were liable for fraud and/or conspiracy to defraud as well as breach of fiduciary duties as pleaded in paras 32 and 35 read together with para 34 of the statement of defence and counterclaim. Thus WFMSB prayed, amongst others, for the following reliefs:

(a) that Wan Yin Ney, Wan Kim Hong and/or WDSB be ordered to permit WFMSB though any of its present directors to inspect the profit and loss account and accounting records of WDSB of 2010–2012;

(b) that Wan Yin Ney, Wan Kim Hong and/or WDSB be ordered to permit an auditor appointed by WFMSB to examine the profit and loss account and accounting records of WDSB of 2010–2012;

(c) a declaration that Wan Yin Ney, Wan Kim Hong and/or WDSB be ordered to return or pay back to WFMSB all business proceeds and income of WFMSB that were diverted and divested by Wan Yin Ney and/or Wan Kim Hong into the account of WDSB or any other companies or individuals; and

(d) damages to be paid by Wan Yin Ney, Wan Kim Hong and WDSB.

DEFENCE TO COUNTERCLAIM OF WAN YIN NEY, WAN KIM HONG AND WDSB

[25] In gistall of them denied the counterclaim of WFMSB by maintaining that there was no conspiracy whatsoever. Moreover WDSB is a separate legal entity from Wan Yin Ney and Wan Kim Hong. In any event, it is contended that all the commercial transactions that occurred between WDSB and WFMSB were properly and lawfully undertaken.

FINDINGS OF THE COURT

[26] I will proceed to determine the original claim followed by the counterclaim.

ORIGINAL CLAIM

[27] The first head of WDSB's claim is for furniture and accessories sold and delivered to WFMSB. I have in *CFB Aluminium Extrusion Sdn Bhd v Lim Soon Seng* [2014] AMEJ 1192 said as follows:

> 16 *Generally, it is plain that the seller in a claim for payment for goods sold and delivered must prove that the order was made and the goods were received by the buyer. The proof is commonly by way of producing in court the purchase order, delivery order and the invoice for the goods ('the key documents')*. In *Oakwell Engineering International Pte Ltd v PCM Feam (M) SdnBhd* [2014] 11 MLJ 175; [2014] 1 AMCR 596, I have said at p 602 that:
>
> > [12] The quality of the evidence required to prove allegations is still subject to the antiquated 'best evidence' rule. In the textbook Phipson* 6 on Evidence 17th edition, it is stated in paragraph 7-40 to 7-43 that: 'The maxim that 'the best evidence must be given of which the nature of the case permits' was once treated as expressing the great fundamental principle upon which the law of evidence depends. Thus, Lord Hardwicke went so far to say that 'the judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will permit' ... In the present day, then, it is not true that the best evidence must, or may always be given, though its non-production may be a matter for comment, or affect the weight of that which is produced ... '. Further it is stated at paragraph 42-10 to 42-11 that: 'Extrinsic evidence is sometimes admissible to prove the existence as distinguished from the terms of some transaction or relationship which has been reduced to writing ... On the

other hand, strict proof of a transaction of the document is sometimes required, though the terms thereof may not be in dispute. Thus, on a charge of perjury committed in proceedings before justices for refusing to leave licensed premises, the license must be produced, and oral testimony by the proprietor that he is licensed is inadmissible. So, the fact, that a person is rated to the relief of the poor can only be proved by the rate-book, or secondary evidence thereof and not by parol'.

[13] Consequently in civil litigation particularly construction type litigation, I am of the view that relevant documents that substantiate or support the oral allegations must be adduced at the trial where such documentary evidence is expected to be available in the ordinary course of business and commerce. Otherwise a reasonable explanation must be tendered to justify their non production. In the absence of these documents or explanation of their absence, mere oral testimony is not weighty enough to overcome the burden of proving the allegations on a balance of probabilities ... (Emphasis added.)

17 *Thus and unless admitted by the Defendant, it is necessary for the Plaintiff in this case to produce the key documents, otherwise other cogent associated documents or reasonable oral explanation of their non production in lieu to succeed in its claim here.* (Emphasis added.)

[28] I have thereafter in *Planete Enfants Sdn Bhd v Goh San Hwa (and another case)* [2015] AMEJ 38 further said as follows:

I have recently in *CFB Aluminium Extrusion Sdn Bhd v Lim Soon Seng* [2014] AMEJ 1192 held that in a claim for goods sold and delivered, it is generally essential for the plaintiff to produce to the court 3 key documents, to wit: the purchase order, delivery order and invoice unless satisfactorily explained otherwise. A similar position was apparent in *Dolomite Readymixed Concrete Sdn Bhd v Zalam Corporation Sdn Bhd& Ors* [2012] MLJU 707; [2012] 1 LNS 335. Nonetheless, I wish to point out that the parties in both these cases were in an ordinary supplier and purchaser/customer relationship. In such commercial transactions, these documents are normally expected to be generated in the course of business and hence produced as the best evidence in court. *I am however of the view that the sort of documentation generated need not be identical in a supplier and wholesaler/distributor relationship particularly where there is a master distribution agreement and commonality in shareholding/directorship of the supplier and distributor companies as in the case herein. In other words, more informality and flexibility are to be expected including without formal purchase orderissued in writing*. (Emphasis added.)

[29] The relationship between the parties here is between related companies with certain common shareholders and directors. WDSB seems to be the major, if not sole supplier of the household furniture to WFMSB for the latter's retail business. In the words of Choo Oi Fong, the transactions were treated as inter-company stock transfer within the Wescourt group. Nevertheless, WFMSB is neither a wholly owned subsidiary of WDSB nor having identical shareholders. There isalso no written master distribution agreement executed

by them that sets out the supply price and other terms and conditions including payment terms and documentation mechanism for furniture supplied. Thus and unless otherwise cogently explained to the contrary, I am of the view that WDSB would at the very least be expected to produce the key documents being the invoices that are substantiated by properly acknowledged delivery orders for all the furniture supplied for purposes of their payment claim.

[30] In addition, it is my view that WDSB must in the pursuit of its claim in the circumstances also establish that the property in the furniture has passed from WDSB to WFMSB. In other words, it must be established that the transfer of the furniture was an outright sale and not on consignment for display only. If it was on consignment, the furniture would of course be deemed sold to WFMSB if the furniture has been subsequently purchased by WFMSB's customers.

[31] The particulars of the furniture allegedly sold by WDSB to WFMSB are summarised in para 8 of the statement of claim based on 33 invoices for furniture supplied from mid 2011 to June 2012. According to PW1, they were supported by documents exhibited in bundles C1 and C2 pp 1–429.

[32] At the clarification, I have requested WDSB to analyse and collate them systematically particularly the key documents following each invoice. WDSB however failed to do so.

[33] In consequence, I have to undertake the arduous task of reviewing them myself. I discover there were numerous purchase orders issued by WFMSB for furniture and accessories to be delivered to Sg Buloh Store A or B. There is no price indicated in the purchase order and it is unclear who in WFMSB made the order. Also there were numerous store delivery orders of furniture and accessories delivered to Store BTC, Kulai showroom, Store Blk (Balakong), Store B Sly (Selayang) & HQ, etc. Several of the delivery orders have WFMSB's endorsement of receipt but many others were blank. The 33 invoices referred to in para 8 of the statement of claim were actually inter-company memos issued by PW1 on behalf of WDSB to WFMSB. These inter-company memos refer to a list of invoices but these invoices were not produced in the trial bundles of documents.

[34] At the trial, Choo Oi Fong only briefly explained that WDSB acted as the main warehouse keeper for the whole Wescourt group including WFMSB. As I understand it, the warehouse is the central location of storage of the furniture and accessories of orders purchased by the Wescourt group including WFMSB. The furniture and accessories stored thereinwould then be sent to the 20 retail outlets of the Wescourt group weekly or twice monthly. As to the

documents produced in support of the claim, she merely commented on them generally without reconciling them with the claim made at the trial. She did not even illustrate a sample claim amongst the thirty three claims by demonstrating in detail the complete transaction as supported by the key documents and clarifying the gaps seen amongst them.

[35] In short, I find that WDSB has merely thrown the whole heap of the available unprocessed documents to the court. Without sieving and collating them, they are to my mind meaningless and plainly inadequate to cogently support and sustain WDSB's claim. Besides, there is also no evidence led as to the agreed price of the furniture and accessories sold and delivered as well as that they were indeed goods purchased and not goods delivered on consignment.

[36] Consequently, I am not satisfied that the WDSB has discharged its burden of proof on the balance of probabilities and I find and hold that the claim for the allegedly unpaid furniture and accessories supplied in the sum of RM376,393.87 must fail for want of proof.

[37] The other head of WDSB's claim is for the recovery of expenses mainly of handphone charges allegedly incurred and advanced by WDSB on behalf of WFMSB from March 2011 to July 2012. The particulars of the claim are also found in para 8 of the statement of claim.

[38] The acceptability of the claim or otherwise is largely a question of fact. WDSB again produced a heap of unprocessed documents in bundles C3 pp 430–651 comprising of debit notes, handphone bills, etc to support the claim. Wan Kim Hong generally testified that all the expenses incurred were known by Ho Kam Chon and Loh Yew Kong for purposes of WFMSB in the course of running WFMSB's business. They denied such knowledge.

[39] From my review of the documents, the handphones comprising of telephone numbers 016–4421908, 016–2171906 and 012–3491907 are all registered in the name of WDSB. However WDSB did not call the user(s) of the handphones as witnesses to explain the usage of the calls. Hence it is questionable whether the calls from the handphones were actually made for whose benefit — WFMSB or WDSB? The debit notes issued by Choo Oi Fong to WFMSB to recover the claim do not seem to be cogently and fully supported by the handphone bills as well. Likewise, the other miscellaneous charges for repair and maintenance as well as electricity bill for Store B were unexplained. The person that was responsible for them is Lee Seok Kim but she was not called as witness at the trial.

[40] In the circumstances, I find and hold that WDSB has again failed to discharge its burden of proof on the balance of probabilities in the pursuit of this head of its claim amounting toRM32,378.08.

[41] Although I have found the original claim pursued by WDSB not to have been adequately proved, I am however hesitant from the evidence adduced to make a finding that WDSB has falsified documents to pursue that claim as alleged by WFMSB. There is in other words also insufficient evidence to prove that allegation.

COUNTERCLAIM

[42] The counterclaim of WFMSB against WDSB and Wan Yin Ney and Wan Kim Hong is premised on fraud or conspiracy to defraud as well as for breach of fiduciary duty. However it is apparent from the written closing submissions of WFMSB that the counterclaim has now been narrowed down to breach of fiduciary duty of Wan Yin Ney and Wan Kim Hong as directors of WFMSB and accordingly the requirement to account to WFMSB. Besides WDSB was utilised in the course of the transactions that gave rise to the alleged breach of the duties.

[43] It is common ground that both Wan Yin Ney and Wan Kim Hong were directors but they are presently still shareholders of WFMSB. I find that they voluntarily resigned as directors on 25 November 2011.

[44] At common law, it is trite and plain that directors owe fiduciary duties to the company. It suffices for me to refer to three cases.

In the court of appeal case of *Alcatel-Lucent (M) Sdn Bhd (formerly known as Alcatel Networks Systems (M) Sdn Bhd) v Solid Investment Ltd* [2012] 4 MLJ 72, Ramly Ali JCA (now FCJ) held as follows at p 82:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. *A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal*. (Emphasis added.)

Next, in *Magnifine Sdn Bhd v Yap Mun Him* [2005] 6 CLJ 413, Richard Malanjum J (now CJ Sabah and Sarawak)) held at pp 423–424:

> As a fiduciary the defendant was obliged to make a full and frank disclosure of not only the fact that he was being paid but also as to the amount. Indeed even with a full and frank disclosure the no-conflict rule and no-profit rule would not have excused or exempted him from his fiduciary duty to act bona fide in the interest of the plaintiff and for properpurposes. (See: *Neptune (Vehicle Washing Equipment) Ltd*

v Fitzerald (No 2) [1995] BCC 1000; *Bray v Ford* [1896] AC 44).

It is also my finding that the defendant was never authorised, expressed or implied, by the Board of Directors of the plaintiff or by any of the directors of the plaintiff to collect any form of payment from Ancom or from any of the other suppliers of the plaintiff. If indeed he was given the permission he would have no problem informing the other directors of the bank accounts into which those payments were credited. In fact the defendant admitted that he had utilised the money received from Ancom for his own benefit such as to pay for his housing loan installments. It was also not shown to the court that such conduct by the defendant was permissible under the memorandum and articles of the plaintiff. *It must be remembered that the no-conflict rule and no-profit rule are indeed very strict against a fiduciary. Even consent or knowledge of any of the directors or shareholders cannot be considered as that of a company-beneficiary especially if it is a victim of fraud or illegal activity to the detriment of its assets* (see *Yap Sing Hock & Anor v Public Prosecutor* [1992] 4 CLJ 1950; [1992] 1 CLJ (Rep) 356; [1992] 2 MLJ 714; *Belmont Finance Corporation Ltd v William Furniture* [1979] 1 All ER 118; *Attorney-General Reference (No 2 of 1982)* [1984] 2 All ER 216).

I also find that the explanation by the defendant that the payments were for the benefit of the plaintiff remained just an assertion without any credible evidence adduced. In any event such noble intention, if there was any, would be irrelevant and would not have exempted him, being a fiduciary, from the rigours of the no-conflict principle (see *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378).

It is trite law that directors are fiduciaries and as such they are subject to the no-conflict principle in equity. They are not allowed to put themselves in a position where their duties conflict with their interests. And 'the taking of commissions or bribes or any kind of undisclosed benefits by a director from any party with which a company is dealing with is the most obvious form of conflict between duty and interests or the making of secret profits' — Corporate Powers Accountability by Loh Siew Cheang (2nd Ed) (see also *Tan Kiong Hwa v Andrew SH Chang* [1974] 1 LNS 168; [1974] 2 MLJ 188 : *Boston Deep Sea Fishing and Ice Company v Ansell* (1888) 39 Ch 339; *Fur Ltd v Tomkies* [1936] 54 CLR 583). (Emphasis added.)

Also in *Simmah Timber Industries Sdn Bhd v David Low See Kiat & Ors* [1999] 5 MLJ 421, Kamalanathan Ratnam J held at p 432:

In addition to the above stated statutory impositions (s 132 Companies Act), a director is also in a position as a fiduciary of the company, being a person entrusted with the assets of the company and whose duty is to perform to the best interest of the company. In *Hospital Products Ltd v United States Surgical Corp & Ors* (1986) 156 CLR 41, Gibbs CJ, reflecting the majority view of the High Court of Australia, had this to say in respect of fiduciary duty (at p 68):

The authorities contain much guidance as to the duties of one who is in a fiduciary relationship with another, but provide no comprehensive statement of the criteria by reference to which the existence of a fiduciary relationship may be established. *The archetype of a fiduciary is of course the trustee, but it is recognized by the decisions of the courts that there are other classes of persons who normally stand in a fiduciary relationship to one another — ie partners, principal and agent, director and company, master and servant, solicitor and client, tenant-for-life and remainderman. There is no*

reason to suppose that these categories are closed. However, the difficulty is to suggest a test by which it may be determined whether a relationship, not within one of the accepted categories, is a fiduciary one.

This passage was quoted with approval by our Court of Appeal in *Tengku Abdullah ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd &Ors* [1996] 2 AMR 2633at p 2665. *It is my judgment that a director who acted in his own interest has, therefore, breached his duty as a trustee of the company. In particular, I hold that where monies or assets belonging to the company are transferred to the director, he shall hold the same under a resulting trust.* In *Makepeace v Rogers* (1865) 34 LJ Ch 396 at p 397, Stuart VC said:

... I conceive that, wherever the relation between the person who seeks an account and the person against whom it is sought arises out of an employment which partakes of a fiduciary character, the fiduciary character of the employment imposes upon the person employed, the duty of keeping accounts and of preserving vouchers, and, according to the old law, which I trust will continue to be the law of this court, a bill in such a case for an account in equity may be sustained.

No doubt, as a director of the plaintiff, the first defendant became its agent and it is my judgment that the plaintiff, as the principal, is entitled to demand that the first defendant account for any or all of the secret profits received by him ...(Emphasis added.)

[45] Besides the common law, there are statutory prescribed duties in the Companies Act 1965 too, to wit:

Section 132 As to duty and liability of officers

(1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company;

(1A) A director of a company shall exercise reasonable care, skill and diligence with:

(a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(b) any additional knowledge, skill and experience which the director in fact has.

Section 167 Accounts to be kept

(1) Every company and the directors and mangers thereof shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheet and any documents to be attached thereto to be prepared from time to time and shall cause those records to be kept in such a manner as to enable them to be conveniently and properly audited.

(1A) Every company and directors and mangers thereof shall cause appropriate entries to be made in the accounting and other records within sixty days of the completion of the transaction to which they relate.

(6) The Court may in any particular case order that the accounting and other records of a company be open to the inspection by an approved company auditor

A acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

Section 169 Profit and loss account, balance sheet and director's report

B (1) The directors of every company shall, at some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year at intervals of not more than fifteen months, lay before the company at its annual general meeting a profit and loss account for the period since the preceding account (or in the case of the first account, since the incorporation of the company) make up to a date not more than six months before the date of the C meeting.

[46] In this case, Ho Kam Chon and Loh Yew Kong testified that they were 'sleeping shareholders' and have entrusted the running of WFMSB to Wan Yin Ney and Wan Kim Hong. This is however denied by Wan Kim Hong who D testified to the contrary that both he and his sister Wan Kim Ney were merely minority shareholders of WFMSB without executive powers. Instead Ho Kam Chon and Loh Yew Kong had full control of WFMSB directly or indirectly through the appointment of Allan Ho as the chief executive officer.

E **[47]** From the documentary evidence adduced as well as circumstantial evidence, I find and hold that WFMSB were managed by Wan Kim Ney and Wan Kim Hong from March 2010 to November 2011.

Firstly I am satisfied that Ho Kam Chon and Loh Yew Kong had no experience F and expertise in the household furniture business and were dependent particularly on Wan Yin Ney to manage WFMSB as their joint investment vehicle. Although listed as a witness, Wan Yin Ney did not appear at the trial and this is an occasion where the adverse presumption as set out in s 114(g) of the Evidence Act 1950 should apply because Wan Yin Ney is in my view not G only herself a defendant in the counterclaim but also a material witness for WDSB.

[48] The finance and administration of WFMSB was clearly managed by Choo Oi Fong who is the wife of Wan Kim Hong and with the assistance of an H Amutha employed by WFMSB as from September 2010. Choo Oi Fong was not only a cheque signatory but she controlled and managed the internet banking account of the Wescourt group including WFMSB. She also controlled the credit card facility of WDSB that was used to collect customer payment for purchases from the retail customers of WFMSB.

I **[49]** I find that Ho Kam Chong and Loh Yew Kong merely monitored the performance of WFMSB through management meetings. This is unsurprising since the original intent was to leave it to Wan Yin Ney to manage the business. Initially the meetings were sporadic but they became regular and monthly after

both of them sensed that there were irregularities because the requisite corporate performance results were not achieved. From the minutes of meeting produced in court, the third, fourth and fifth management meeting were held on 26 August 2011, 12 September 2011 and 8 October 2011. It is observed from the minutes of meeting that there were repeated requests by Ho Kam Chon for the profit and loss accounts, monthly balance sheet, bank in slips and transfer of internet banking password access. The usage of WDSB's credit card facility was terminated on 26 August 2011 to avoid further problems.

[50] Moreover I also find that the compulsory statutory accounts for 2010 were also not produced by Wan Yin Ney and Wan Kim Hong and I conclude that the accounts have neither be prepared nor audited and filed with Companies Commission of Malaysia.

[51] It seems that as the result of the repeated queries from Ho Kam Chon and Loh Yew Kong since August 2011, Wan Yin Ney and Wan Kim Hong tendered their resignation as directors of WFMSB on 25 November 2011 that was accepted by the board of directors.

[52] However to-date the detail records and accounts for WFMSB as well as the credit card transactional records of WDSB on behalf of WFMSB were never produced to WFMSB by Wan Yin Ney or Wan Kim Hong.

[53] WFMSB thus appointed SF Chang Corporate Services Sdn Bhd to conduct an independent review of the credit card sales of WFMSB from 28 August 2010 to 30 October 2011 based on the available information. In this regard Chan Siew Foong found there was a gap in the credit card sales record from 25 August 2010 and 1 April 2011 and a gap also in the sales transaction at the AEON Jusco retail outlets from 1 April 2010 to 9 April 2011 because the payments were made directly by the customers to WDSB. The estimated unaccounted sales amounted to RM1,239,068.72 and RM507,962.77 respectively totalling to RM1,747,031.49.

[54] It is also seen and as testified by Choo Oi Fong that WDSB only between 1 December 2011 and 29 December 2011 via eight credit entries credited RM1,298,000 into the bank account of WFMSB through internet banking. There is however no particulars provided to-date as to what credit card and/or sales transactions they were related. That notwithstanding, Chan Siew Foong pointed out that between 29 November 2011 and 27 December 2011, WDSB also via eight debit entries debited RM1,282,668.41 into the bank account of WDSB from the account of WFMSB through the same internet banking. In a rather convoluted way as testified by Choo Oi Fong, I understood the debit entries to be the costs of goods whilst the credit entries to

be sales revenue; thus the nett balance credited represented the gross margin attributed and paid back toto WFMSB.

[55] However Chan Siew Foong testified that he perceived the underlying transactions related to the aforesaid debit and credit transfers tobe suspicious because he could not find any supporting documents of WDSB thereto.

[56] From the evidence as emerged, I am convinced that Wan Yin Ney and Wan Kim Hong have not satisfactorily discharged their fiduciary duties as directors of WFMSB. They have not adequately accounted for the sales and financial transactions that occurred and ensured that proper records were properly prepared, kept and retrievable during their watch. There is reasonable suspicion that they might have benefitted personally through WFMSB. As aforesaid, they also failed to prepare, keep and file the compulsory statutory accounts. In the circumstances, I hence find and hold that they have breached both their common law and statutory duties as directors of the company. In the same vein, WDSB that is controlled by Wan Yin Ney has also not properly accounted for the sales and financial transactions involved on behalf of WFMSB. In law, the sale proceeds of WFMSB handled by WDSB were subject to a resulting trust; see *Sinmah Timber Industries Sdn Bhd*.

[57] The Rules of Court 2012 in O 43 and 44 provide for accounts and inquires and proceedings under judgments and orders on the equity side respectively. In the Malaysian Civil Procedure 2013, it provided at p 563 para 43/0/2 on the invocation of O 43 that the order allows for myriad situations in which the taking of accounts could be applied for in an action ... First, an order of an account of administration for common accounts requires the defendant to account for what he has actually received and his disbursement and distribution of it. The order need not imply any wrong doing by the defendant ... Second, an order for an account of profits for specific equitable wrongs arising from a breach of trust or fiduciary duty. The order for an account is directed to the gains received by the defendant as a result of the equitable wrong doing: see *Mohd Zain Yusoff & Ors v Avel Consultant Sdn Bhd & Anor* [2006] 6 MLJ 314; [2006] 5 AMR 489 at p 320; following *Warman International Ltd v Dwyer* (1995) 182 CLR 544; and *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff Bin Shah Mohd & Ors And Other Appeals* [1996] 2 MLJ 265 (CA) at p 322.

[58] In the circumstances, I hold that it is only just and reasonable for WFMSB to require an account be taken as provided in O 43 of the Rules of Court 2012 and in conjunction thereto enforced as provided in O 44 of the same rules.

CONCLUSION

[59] For the foregoing reasons, the original claim is dismissed. The counterclaim is allowed in that WDSB, Wan Yin Ney and Wan Kim Hong are ordered to account to WFMSB for all the transactions in respect of or in connection with WFMSB that took place from 1 April 2010 to 25 November 2011 and payment of damages to WFMSB as ascertained (if any) upon the taking of the accounts together with interests thereon at 5%pa from 7 November 2012 until full realisation.

[60] Costs of RM40,000 is awarded to WFMSB in respect of the original claim and counterclaim taken together.

Order accordingly.

Reported by Afiq Mohamad Noor